No. 12478

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS CROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

Appellee's Reply to Appellant's Reply to Appellee's Supplementary Brief.

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Appellee's Reply to Appellant's Reply to Appellee's Supplementary Brief.

At the time of oral argument, August 10, 1950, leave was granted the Appellant to reply to Appellee's Supplementary Brief more fully by Memorandum, and at the same time the Appellee was given leave to file a Memorandum in reply within 15 days. Appellant's Memorandum was received by Appellee on August 23, 1950, and consists of argument in support of his contentions that: (1) Appellant's motion to vacate the sentence is not premature, and, (2) *United States v. Gallagher* does not dispose of the question raised as to the constitutionality of Rule 20 of the Federal Rules of Criminal Procedure. (A. R. 1-2.)* The argument of Appellee will follow in the same order.

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*References preceded by the letters "A. R." are to Appellant's Reply to Appellee's Supplementary Brief.

ARGUMENT.

Appellant's Motion to Vacate the Sentence, Under Section 2255 of Title 18, United States Code, Is Premature.

The Appellant contends that an ambiguity exists in Section 2255 of Title 28, U. S. C. None, in fact, exists. The statute provides a remedy whereby a prisoner in the custody of the United States may attack the validity of the sentence he is serving in the court wherein he was sentenced.

The second paragraph of the section states that, "A motion for such relief may be made at any time." It is limited by the language of the first paragraph of the section. The Appellee submits that this second paragraph was designed to avoid the limitation appearing in the case of *United States v. Mayer,* 235 U. S. 55, wherein the Court stated at page 67:

> ". . . a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term."

The Appellant argues that Congress must have intended by this section to authorize prisoners to attack a sentence at any time (A. R. 3), and advances as one argument supporting his construction that it would operate to prevent evidence from becoming stale. But his construction would also have just the opposite effect. The possibilities are far-reaching, for an appellant could be a prisoner seeking to set aside a sentence he served many years ago. The limitation to his seeking of the remedy

would be his death. A 70-year-old prisoner could move to have a sentence of three years, which he served in his youth, set aside. Where would then be the "Court which imposed the sentence"?

But the plain language of the statute readily lends itself to a preferable construction. The prisoner must be "in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that *the sentence* was imposed in violation of the . . . laws of the United States . . ." and he may ". . . move the court which imposed *the sentence* to vacate, set aside or correct the sentence." (Emphasis added.) Appellant would have us read the emphasized phrases as "a sentence." Such violence to the language of a statute cannot be supported under any rule of construction, and this is particularly true when the violence would achieve the possible results which would obtain under Appellant's construction. Also, it is submitted, the Appellant must be one "claiming the right to be released," in the language of the section. Thomas Crow does not claim that right.

Appellant is deprived of nothing if he is required to wait until April, 1953, to move the court below to vacate his sentence. The argument is advanced that if he could now successfully move the court to vacate the one-year sentence, he would be eligible for parole on his present sentence. (A. R. 6.) But this is to disregard the obvious intention of the sentencing court that Appellant should serve the full five years of his first sentence. We must assume that the sentencing court imposed the

consecutive one-year sentence to insure a five-year sentence. In effect, Appellant now asks this Court to award him not one year of freedom, but approximately three years, if his efforts toward parole were later successful. These considerations may have been important in the drafting of Section 2255, and may also explain why the Writ of Habeas Corpus has never been available in anticipation of imprisonment. The imposition of a consecutive sentence is calculated to insure a certain minimum sentence. The Appellee urges that sentence imposed properly should remain undisturbed. The Appellant cannot complain if his remedy is available at the usual time, namely, when he is unlawfully in custody. Appellant's whole argument in this regard is based upon the false assumption that he is deprived of a right in being deprived of parole possibilities; yet, may we not assume that the sentencing court would have imposed a much longer term of imprisonment in Case No. 19821, had no sentence been imposed in the instant case, to insure imprisonment of five years? While it is true that this reasoning will not apply in those instances where the consecutive sentence is imposed by some other court at a later time, those situations are so rare as to be valueless in these considerations.

It may be that Appellant has a remedy to move the lower court to vacate the sentence at this time, under the dictum in *Holiday v. Johnson*, 313 U. S. 343. It appears that the Appellant in *Lockheart v. United States*, 136 F. 2d 122, was successful in securing anticipatory relief, the Court ruling that Lockheart had filed a "motion to vacate

sentence." In *Rutkowski v. United States*, 149 F. 2d 481, the Appellant filed a "motion to vacate sentence," and secured anticipatory relief. Other cases cited by Appellant (A. R. 11), appear to hold that a motion to vacate sentence may be entertained at any time by the sentencing court. But the Appellant here chose to proceed under a statute and is bound by its terms. None of the cited cases are concerned with procedure under Section 2255. All were cases decided prior to enactment of Section 2255. The case of *United States v. Bice*, 84 Fed. Supp. 290, is a case where the defendant moved the sentencing court by "motion to vacate sentence." The defendant sought to have set aside a sentence he had served twenty-one years before. Although this case arose after enactment of Section 2255, the defendant did not proceed under that section. His motion was entertained. The case demonstrates that a "motion to vacate sentence" may be available to this Appellant, but he has chosen the wrong remedy here.

Appellant urges that Congress could not have intended to deny anticipatory relief under Section 2255. How easy it would have been for Congress to give a clear statement of that intent in the drafting of the section. If we assume that what Appellant urges is to be desired, it, nevertheless, is for Congress to give it expression. Appellee has found no decision where anticipatory relief was granted under this section nor has Appellant cited any such cases.

Rule 20 of the Federal Rules of Criminal Procedure Is Valid Under the Constitution and Laws of the United States.

The Appellant urges that the case of *United States v. Gallagher* (unreported, decided June 21, 1950, in a unanimous opinion with six judges sitting *en banc* in the Court of Appeals for the 3rd Circuit), is not substantial authority for the constitutionality of Rule 20 of the Federal Rules of Criminal Procedure because the question was decided without it having been raised by the Appellant on his appeal. (A. R. 12.) The Appellee now offers additional authority for the constitutionality of the Rule, in the case of *Levine v. United States*, 182 F. 2d 556. In this case from the Court of Appeals for the 8th Circuit, decided May 31, 1950, the Appellant urged that his motion to vacate judgments and sentences in two cases be granted because they arose from his pleas of guilty under the provisions of Rule 20. Appellant had been indicted in the Eastern District of Michigan and the Northern District of Illinois for violations of United States Postal Laws. After his arrest in the Eastern District of Missouri he pleaded guilty under the provisions of Rule 20 in that District and was sentenced. The Appellant relied on *United States v. Bink,* 74 Fed. Supp. 603, to support his argument that the Rule was unconstitutional. In rejecting the *Bink* decision and upholding the constitutionality of the Rule the Court at page 558 said:

> "The cited case supports the contention of appellant, but it is not, of course, controlling on this court.

> We are of the opinion that Rule 20 is constitutional; that a person charged with a federal offense in one district may waive the right to be tried in that district, and that he may request a transfer to another district to enter a plea of guilty, and that a judgment entered in the district to which the case is transferred is a valid and binding judgment."

The Court rejected the argument of the *Bink* case to the effect that place of trial is jurisdictional under Article III, Section 2, Clause 3, and the Sixth Amendment, of the Constitution, and cannot be waived by the defendant, and held, as was held in the *Gallagher* case, that place of trial is a procedural right and privilege which may be waived. The Court also observed that "Rule 20 and all other Rules of Criminal Procedure for the United States District Courts have been approved by the Supreme Court . . ." We now have express approval of the rule by decision in two circuits and approval by the Supreme Court. In conclusion we wish to point out that the Rule has been supported in the *Gallagher* and *Levine* cases without passing on the important question of what is meant by the word "trial" as it appears in the above cited constitutional provisions. The act of pleading guilty may not be embraced by the word "trial."

Conclusion.

The Appellant may at this time have a remedy whereby he might seek vacation of the sentence in Case No. 19946, by a motion to vacate; but here he has chosen to proceed under the provisions of Section 2255 of Title 28 which provide only for an attack on a sentence being served by one claiming the right to be released, and his motion is premature.

Rule 20 of the Federal Rules of Criminal Procedure is a constitutional provision under the rulings of the *Levine* and *Gallagher* cases cited above, and has been approved by the Supreme Court of the United States; it is therefore entitled to the strongest presumption of constitutionality in the absence of a ruling by the Supreme Court.

Respectfully submitted,

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